IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	ID. No. 1102003278
	)	
RASHIE HARRIS.	)	
	)	

ORDER

AND NOW, TO WIT, this 9th day of January, 2012, **IT IS HEREBY ORDERED** as follows:

Introduction

Defendant, Rashie Harris ("Harris" or "Defendant") was indicted on several offenses as a result of two separate robberies on January 30, 2011 and February 5, 2011. Harris moved to suppress: (1) the photo array from the first robbery identifying him as the shooter; and (2) the show-up from the second robbery. Harris additionally filed a Motion to Sever the Charges arising of the first robbery from that of the second. Because the photo array and the show up were not unnecessarily suggestive and there is not a likelihood of irreparable misidentification, the Motions to Suppress are **DENIED**. The Motion to Sever is **DENIED** because both robberies arose from the same general crime and there is evidence of *modus operandi*.

Statement of Facts

First Alleged Robbery

The first alleged robbery occurred on January 30, 2011, at Runn Way Unisex Barbershop, ("Runn Way") located at 333 New Castle Avenue in Wilmington. Runn Way is approximately 14 by 20 feet with three or four chairs that are on a landing towards the north side of the building. There are large windows on the East and South side of the building.

It is alleged that Defendant, Rashie Harris ("Defendant" or "Harris") entered the barbershop with a handgun and demanded money. The two individuals present at the barbershop were victim Jonathan Simmons, ("Simmons") the proprietor of the barbershop, and a minor, who was with Simmons at the time of the robbery. Simmons was shot during the robbery.

Simmons opened Runn Way in the morning. In the afternoon, Harris walked in while Simmons was on the phone and asked how much Simmons charged for a shape-up. Simmons told Harris the price, at which point Harris shut the door, turned around and then displayed a handgun towards Simmons. Simmons observed Harris glaring at the minor and feared for his life. Simmons then punched Harris in the face; a struggle ensued between Simmons and Harris and moments later, Simmons was shot and fell to the ground. Simmons told Harris

to take him outside after he was shot, but Harris removed money from Simmons' pocket and fled the area.

Simmons was transported to Christiana Hospital. While on the way to the hospital, Patrolman Chambers asked Simmons who shot him and Simmons replied, "I can't say right now."[1] Detective Scott R. Burris ("Detective Burris") of the Wilmington Police Department ("WPD") arrived at the scene of the incident at Runn Way in the afternoon. At that time, it was very bright outside and the lights were on in the barbershop.

From January 30, 2010, until February 10, 2010, Simmons was intubated and unable to speak to Detective Burris. During that time, Detective Burris remained in contact with Simmons' mother and the nurse's station at Christiana Hospital for to determine when Simmons could speak to detectives. On February 10, 2010, Detective Burris and Detective Martin Lenhardt ("Detective Lenhardt") went to Christiana hospital and obtained a statement from Simmons.[2] Detective Burris testified that Simmons was very weak and tired and seemed like he was in pain. However, Simmons was alert, coherent, and able to understand, follow and answer questions.

[1] Transcript ("T.") at 21. Detective Burris wrote a supplemental report in this case and interpreted this statement to mean that the victim knew who shot him.

Two photo arrays with six pictures each were used in this identification. Photo array #1 contained six photos, none of which contained a photo of Harris. Photo array #2 contained six photos, one of which (picture #5) was Harris's photo. The Detectives first showed Simmons photo array #1 but Simmons did not recognize any individual as his shooter. The Detectives then showed Simmons photo array #2. Simmons instantly, and without doubt or hesitation, identified Harris from the line-up. Simmons reacted emotionally by smacking the paper and repeatedly stated, "this is the guy that shot me."[3] Simmons was one hundred percent sure that Harris was the shooter.

The two six-pack photo lineups were created by Image Query by Detective Burris. The lineups were produced by putting Defendant's name in the lineup along with other descriptions.[4] Simmons referred to another individual during the identification that Simmons thought was connected with Harris. Detective Burris interviewed the other person that Simmons referred to during the identification. The other individual did not know Harris. Detective Burris spoke with Simmons after the hospital statement on February 10, 2011, and Simmons indicated that he believed this other individual was connected with Harris only because he was in

[3] T. at 16.
[4] Detective Burris indicated that the hearing that he generated the photo line up based on victims' statements from the Legends robbery.

Runn Way a few minutes before Harris entered the barbershop on February 5, 2011.

On July 27, 2011, Detective Lenhardt interviewed Simmons at Runn way. Simmons informed Detective Lenhardt that prior to the photo identification on February 10, 2011: (1) Simmons did not see a picture of Harris; (2) Simmons did not speak with anyone about Harris prior to identifying him; (3) Simmons did not read any newspaper articles about the robbery at Runn Way or the subsequent robbery on February 5, 2011 and; (5) Simmons never saw Harris prior to January 30, 2011.

Detective Burris interviewed the minor, who was in Runn way with Simmons on February 21, 2011. During the interview, Detective Burris showed him photo array #2 that contained Harris's picture. The minor did not make a positive identification after seeing the array.

As a result of the alleged events of January 30, 2011, Harris was indicted for Attempted Murder in the First Degree, 4 counts of Possession of a Firearm During the Commission of a Felony ("PFDCF"), Burglary Second Degree, Robbery First Degree, Kidnapping First Degree, and Kidnapping Second Degree.

Second Alleged Robbery

On February 5, 2011, at approximately 12:27 p.m., Officers Verna and Cain of the WPD responded to an alleged robbery on the 500 block of Sherman Street.

The officers were informed via Wilmington communication center ("WILCOM") that a victim was following the alleged perpetrator and they were in the area of Howard High School of Technology located at 401 East 12th Street.

The officers conducted a search of the area and discovered one of the victims, Deridrick Boyd, ("Boyd") being assisted by a motorist, at 12th and Wilson Streets. The victim was "jumping up and down frantically pointing northbound on Wilson Street"[5] which directed the officers' attention to Harris who was walking northbound on the 1300 block of Wilson Street.[6] The officers observed Harris walking northbound on Wilson Street. The officers also received a description of the alleged robber, fitting Harris's description, via WILCOM.

Harris carried two bags – a black knapsack and a purple purse[7] – over his right shoulder. Harris traveled westbound on 14th street; as the officers approached 14th and Wilson, Harris glanced at the police car. Officer Verna attempted to get out of the car; when he made this attempt, Harris dropped the bags and ran westbound on 14th Street. Officer Verna drove the patrol car while Officer Cain pursued Harris on foot.

Harris was apprehended in the 1300 block of French Street and placed into custody. Officer Verna conducted a brief interview of Boyd. Boyd advised

[5] T. at 65.
[6] Officer Verna testified that Harris was first spotted 3-5 blocks from Legends.
[7] The purse contained money, cell phones, watches, keys, IDs and a black revolver. All of theses items belonged to the victims of the Legends robbery.

officers that Harris entered Legends Barbershop, ("Legends"), located at 941 Clifford Brown Walk, locked the front door behind him, displayed a handgun and demanded personal belongings from the people inside the barbershop.

After being placed into custody, Harris was transported to Legends for a show up by Officer Reece.[8] Approximately 25-30 minutes passed between the time the officers were called to respond to the robbery and the time Harris was brought to Legends for the show-up.

Sergeant Leon R. Stevenson ("Sergeant Stevenson") has been employed by the WPD for 29 years and responded to the Legends robbery on February 5, 2011. Upon arrival, Sergeant Stevenson made the ultimate decision to conduct a show-up of Harris, who was in custody at that time.[9] This decision was based on the short amount of time that passed between the robbery and the show-up, the victims being present and the logic that the victims' memory would be most accurate immediately following the commission of the crime.

The victims were inside the barbershop with Sergeant Stevenson 30 minutes before the show-up until the show-up was completed. During this period of time, the identification of Defendant was not discussed with the victims. To ensure victim safety when a show-up is conducted, Sergeant Stevenson instructed the

[8] Harris was in handcuffs standing next to a police car during the show-up.
[9] Harris could have been placed in a "live" line up at the Police Station, but based on Sergeant Stevenson's experience in preliminary investigations, he believed that the show-up was "the best thing to do at the time." T. at 97.

victims to proceed one by one, to the large pane glass window, to confirm or deny whether they recognized Harris. Sergeant Stevenson did not anticipate a discernable benefit from sequestering the victims upon identification because they had interaction prior to the show-up. The victims followed instructions and proceeded one by one to the window to make their identification.[10] Officer Verna observed the victims' reactions during the show up and testified that upon seeing Harris, each victim pointed at Harris and all six victims nodded their heads up and down indicating that Harris was the individual who conducted the robbery at Legends.[11] The reaction of the victims was immediate, without hesitation or doubt.

Harris was interviewed on February 5, 2011, about his involvement in the Runn way and Legends robberies. Harris admitted to committing the Legends robbery on February 5, 2011. The proceeds and weapons from the robbery were recovered, and six victims gave individual statements to Officers Verna and Cain at or near the time of the robbery.

Generally, all of the victims stated that they observed Defendant enter Legends and sit on the couch for a few moments. After a few moments, Defendant got up, locked the door and pointed a revolver at everyone in the barbershop. The

[10] As victims were all together inside the barbershop, they were each within eyeshot and earshot of the identifications.

[11] Statements concerning the show up identification were not obtained by Officer Verna or any other officer.

victims were then ordered to get on the ground.[12] The robbery lasted approximately 15-20 minutes.

Legends is approximately 10 feet by 20 feet in size. On February 5, 2011, it was 32 degrees, breezy with light rain. On that day, Legends was well lit.

As a result of alleged events of February 5, 2011, Harris was indicted for 1 count of Burglary Second Degree, 8 counts of Robbery First Degree, 17 counts of PFDCF, 8 counts of Kidnapping Second Degree, 1 count of Unlawful Sexual Contact First Degree, 1 count of Endangering the Welfare of a Child, 2 counts of Possession of a Deadly Weapon by a Person Prohibited, 1 count of Carrying a Concealed Deadly Weapon, Resisting Arrest, a misdemeanor, and Possession of a Non-narcotic Schedule I Controlled Substance, a misdemeanor.

Harris filed a Motion to Suppress the (1) photo array; and (2) the show-up identification. Additionally, Harris filed a Motion to Sever the Charges of the first and second robberies.

A hearing was held on November 22, 2011. On that day the State provided Harris with transcripts of six of the eight victims from the second alleged robbery that were interviewed in May, 2011. Harris asked the Court for permission to supplement the record with a factual memorandum quoting directly from the

[12] Some of the victims had additional facts in their statements. For example the first victim Officer Cain interviewed stated that she was forced to her side while Defendant fondled her breasts for money. Also, the third victim Officer Cain interviewed said Defendant stated, "you know who I am? I'm the guy who did that murder in Southbridge." T. at 83.

transcripts prior to the Court's ruling on the motion. The Court granted the request. Harris was provided with a copy of the interviews by the State on November 22, 2011, the day of the hearing.

Discussion

I. Motion to Suppress the Photo Array In the First Robbery.

"An identification procedure will not pass constitutional muster where it is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable identification."[13] To violate due process, "the unnecessarily suggestive identification procedure must also carry with it the increased danger of an irreparable misidentification."[14] If a line up is impermissibly suggestive, evidence of the identification will not be excluded at trial so long as the identification is reliable.[15] When determining if an identification procedure is impermissible, this Court must determine under the totality of the circumstances: (1) whether the procedure used was unnecessarily suggestive; and (2) whether there was a likelihood of misidentification.[16] In determining the reliability of the identification, The United States Supreme set forth the following factors to consider:

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[13] *Younger v. State*, 496 A.2d 546, 550-51 (Del. 1985) (internal quotations omitted) (*quoting Simmons v. United States*, 390 U.S. 377, 384 (1968)).
[14] *Id*. (*citing Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972)).
[15] *State v. Sierra*, 2011 WL 1316151, at *3 (Del. Super. Apr. 5, 2011).
[16] *Richardson v. State*, 673 A.2d 144, 149 (Del. 1996) (*quoting Simmons v. U.S.*, 390 U.S. 377, 384 (1968)).

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the time of the confrontation, and the length of time between the crime and confrontation.[17]

Defendant argues that the procedure used to conduct the photo lineup was unnecessarily suggestive, thus, compromising Defendant's right to due process. Specifically, Harris argues that it is not known: (1) whether anyone was in the room with Simmons when he identified Defendant; (2) whether Simmons had contact with other individuals ten days prior to the lineup procedure; (3) who was responsible for creating the photo line up; (4) what was discussed on the phone between Detective Burris and Simmons, prior to the identification; and (5) why two photo arrays were used. Defendant additionally argues that Detective Burris gave only a cursory introduction and stated he was going to show Simmons two lineups. Further, Defendant argues that Detective Lenhardt engaged in tactics that would render an in-court identification highly prejudicial to Defendant because he confirmed the "correct" choice by stating that Defendant is "in jail for a while and ain't [sic] getting out anytime soon."

Defendant additionally argues that the unnecessarily suggestive procedure led to a high likelihood of misidentification. He argues that the factors in this case demonstrate the following: (1) because a weapon was brandished, Simmons was

[17] *Richardson*, 673 A.2d at 148 (*citing Manson v. Brathiwaite*, 432 U.S. 98, 114 (1997)).

more focused on the weapon than the physical attributes of the Defendant; (2) Simmons' attention was most likely focused on the weapon; (3) it is not known whether a full description of the robbery suspect was given prior to the line up; (4) while it appears that Simmons is certain of the person who shot him, he notes that the person who shot him used to be fatter and knew another individual; (5) the ten days between the robbery and the identification is a long period for visual memory and raises the question of what other factors may have influenced Simmons' decision.

A. The Photo Array Was Not Unnecessarily Suggestive.

The photo array is not impermissibly suggestive. A photo array is not impermissibly suggestive when the people in the photos have similar skin tone[18] and facial characteristics as defendant and the photos are similar in scale and orientation.[19] The two arrays used were generated by Image Query by Detective Burris. Each line-up contained 6 pictures of African-American males, with facial hair.

Defendant alleges that Simmons did not know who shot him based on the way to the hospital stating, "I can't say right now." This statement is open to interpretation because there are numerous reasons why Simmons would not be able

[18] *Younger*, 496 A.2d at 551.
[19] *State v. Sierra*, 2011 WL 1316151, at *3 (Del. Super. Apr. 5, 2011).

to say who shot him while being transported to the hospital. The Court will not speculate as to the reasoning behind this statement.

Further, the police did not suggest that Harris was the shooter. At Christiana Hospital, detectives told Simmons not to feel like he had to pick anyone. Simmons, however, instantly and without hesitation, identified Defendant in photo #5 of the second line-up. After Simmons identified Defendant, he asked his name and Detective Lenhardt stated, "[h]e's in jail, he ain't [sic] getting out for a while." The practice of telling a witness identification is "correct" could taint identification as to require exclusion of evidence.[20] Defense argues that Detective Lenhardt confirmed the correctness of Simmons' identification. This Court does not agree that Detective Lenhardt confirmed the correctness of the identification.

In *Hubbard v. State* the police officer informed the victim after the photographic lineup that she had had successfully identified the perpetrator.[21] The Delaware Supreme Court held that this Court did not abuse its discretion in holding that the procedures utilized by the officers did not "suggest" the outcome.[22] "Any alleged statements made by a police officer after the photographic array did not undermine the validity of [the] pretrial identification."[23]

[20] *United States v. Jarvis*, 560 F.2d 494, 500 (2d Cir. 1977).
[21] *Hubbard*, 782 A.2d 264, at *6 (Del. 2001).
[22] *Id*.
[23] *Id*.

Here, Detective Lenhardt did not confirm the correctness of Simmons' identification. His comment was a response to a question Simmons asked about Harris' identity. The statement was made after Simmons identified Harris in the second lineup and has no bearing on the admission of the photo array.

Defense argues that Simmons' identification may have been tainted by speaking with people about Defendant and his characteristics. However, at the hearing, Detective Burris testified that he interviewed Simmons on May 27, 2011, at Runn Way, where Simmons informed him that he did not speak with anyone about a description of Harris prior to the robbery.

B. There Is No Danger of Irreparable Misidentification.

Assuming, *arguendo* that the photo line up is impermissibly suggestive, there is no danger of irreparable misidentification as set forth in *Manson v. Brathwaite*. The Delaware Supreme Court held in *Clayton v. State*[24] the circumstances of the photo identification did not lead to a likelihood of misidentification at trial. In *Clayton*, the Court held: (1) the victim had an opportunity to view the robber in a well-lit, empty restaurant for several minutes in both the relaxed state of normal business and then in the stressful situation of a robbery; (2) the victim's degree of attention was high because she was only focused on defendant at the time, as the restaurant was empty; (3) victim's

[24] 892 A.2d 1083 (Del. 2006).

description of the robber which indicated tooth decay does not render the identification unreliable when he actually had braces; (4) the victim was positive in her identification of defendant as the robber; and (5) under the totality of the circumstances, the three month delay between the commission of the crime and line-up was insufficient to render the identification unreliable and inadmissible *per se*.

Here, like the Court held in *Clayton*, the *Manson v. Barthwaite* factors are satisfied. First, Simmons had time to view the robber in a well-lit, empty barbershop that was approximately 14 feet by 20 feet in size. Harris entered Runn way and asked the price of a haircut; Simmons responded to Harris before a struggle ensued and Simmons punched Harris in the face. Simmons was in close proximity to Harris because he was able to punch Harris in the face. Simmons also had an opportunity to view Harris when he was lying on the floor after being shot. After shooting Simmons and before fleeing Runn Way, Harris went up to Simmons and emptied the contents of his pockets. The circumstances present here indicate there was ample opportunity for Simmons to observe Harris.

Second, like *Clayton*, Simmons' degree of attention was high. Defendant was the only customer in Runn Way. Also, Detective Burris testified that Simmons was concerned about the safety of the young boy which is why the struggle ensued in the first place. Thus, Simmons' degree of attention was

heightened because Defendant walked into an empty barbershop, and brandished a gun.

Third, the accuracy of Simmons' prior description is unknown. Detective Burris' testimony indicated that he had been communicating with Simmons' mother about the status of Simmons. There is also an indication from the identification transcript at the hospital that Harris was "fatter now too."[25] However, because it is unclear as to the prior description, this Court will not weigh this factor into the analysis.

Fourth, as evidenced by the audio recording, Simmons was one hundred percent positive in his identification. Detectives Burris and Lenhardt showed Simmons two six pack photo arrays, one of which contained a previous photo of Harris. Simmons did not react to the first array which did not contain Defendant's picture but did immediately, and without hesitation, emotionally react upon seeing Harris' photo.

Lastly, the length of time between the robbery at Runn Way and the identification is not significant. In *Clayton*, there was a three-month hiatus between the commission of the crime and the photographic line-up; the Court held that this length was not sufficient to render the identification unreliable and inadmissible *per se*. The length of time here before the first alleged robbery and

[25] T. at 31.

photo identification was only ten days. From the time of the shooting until the Detectives conducted the photo line up in Simmons' hospital room, Simmons was intubated and unable to speak. The Detectives were in communication with Simmons' mother and went to the hospital once Simmons was able to communicate. Therefore, ten days between the first robbery and the identification does not indicate the identification was improper.

II. Motion to Suppress the Show-up in the Second Alleged Robbery.

Generally, show-ups are "inherently suspect and widely condemned."[26] However, show-ups are not *per se* unnecessarily suggestive.[27] A violation of due process of law is based upon the totality of the circumstances surrounding it.[28] In determining whether to admit an out-of-court identification, "the essential consideration is whether the confrontation was so impermissibly suggestive as to give right to a very substantial likelihood of misidentification."[29] "[A]bsent unnecessary and unfair police suggestion, prompt on-the-scene confrontations, [p]er se, are not so unnecessarily suggestive as to constitute violations of due process rights."[30] When a defendant challenges the out-of-court identification as violating due process, the test is:

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[26] *Clark v. State*, 344 A.2d 231, 237 (Del. 1975).
[27] *Harris v. State*, 350 A.2d 768, 770 (Del. 1975).
[28] *Stovall v. Denno*, 388 U.S. 293, 302 (1967).
[29] *Harris v. State*, 350 A.2d 768, 769 (Del. 1975).
[30] *Watson v. State*, 349 A.2d 738, 740 (Del.. 1975).

> An identification procedure will not pass constitutional muster where it is 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' That a confrontation is suggestive, without more, however, cannot amount to a due process violation; the unnecessarily suggestive identification procedure must also carry with it the increased danger of an irreparable misidentification. In other words, if the Court determines, under the totality of the circumstances, that a [show-up] is impermissibly suggestive, but nonetheless reliable, evidence of the confrontation will not be excluded at trial.[31]

Show-up identifications "are necessary to the proper functioning of the criminal justice system."[32] To be admissible, the Court must decide whether the out-of-court identification was (1) unnecessarily suggestive; and (2) if there was a likelihood of misidentification.[33] As stated above, the likelihood of misidentification depends on the following factors:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.[34]

The Delaware Supreme Court has previously noted the "concern with any police- arranged simultaneous viewing of one suspect by more than one victim."[35] In situations where it is feasible, "the police should have each witness or victim

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[31] *Richardson v. State*, 673 A.2d 144, 147 (Del. 1996) (*quoting Younger v. State*, 496 A.2d 546, 550 (Del. 1985)(citations omitted).
[32] *Id*. at 147-148.
[33] *Harris*, 350 A.2d at 770.
[34] *Biggers*, 409 U.S. at 198.
[35] *Harris*, 350 A.2d at 771.

stand alone and make any identification while standing alone from others."[36] While simultaneous identifications should be avoided, they are not *per se* inadmissible.[37]

A. The Show-Up Was Not Unnecessarily Suggestive.

This case involves identification of the Defendant by six victims of the robbery. The victims were together in the barbershop at the same time but were instructed by Sergeant Stevenson to proceed one by one to the window to make their identification. Under the totality of the circumstances, the show-up was not unnecessarily suggestive.

In *Watson v. State*, the Delaware Supreme Court held that the simultaneous identification by two victims was not impermissibly suggestive, but instead "a natural development under all the circumstances and was not 'arranged' by the police."[38] Victim 1 was seated in the back seat of a police car and the suspect was brought to the car.[39] Victim 1 identified the witness and then Victim 2 made a comment about Defendant's shirt.[40] The Court held that his procedure was not unnecessarily suggestive.[41]

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[36] *Talbert v. State*, 565 A.2d 281, at *1 (Del. 1989).
[37] *Id*.
[38] *Watson*, 349 A.2d at 741.
[39] *Id*. at 739.
[40] *Id*.
[41] *Id*.

In *Richardson*, the Delaware Supreme Court held that the show-up identification was not impermissibly suggestive even though the victim was told the police had a suspect in custody, he was handcuffed and standing next to a uniformed police officer. The entire incident, from the time of the alleged crime to the time of identification was about an hour and fifteen minutes.[42]

In *Smith v. State*, the Delaware Supreme Court held that the show-up procedure was unnecessarily suggestive.[43] In *Smith*, the arresting officer discussed the description of the defendant with three employees who saw his face.[44] After the discussion, right then and there, the first employee identified him and then the other two employees identified defendant as the driver of the conspicuous vehicle.[45] While this procedure was unnecessarily suggestive, the case was affirmed because the identifications were reliable.[46]

Also, in *Harris v. State*, the Delaware Supreme Court held that the first show-up conducted was not unnecessarily suggestive because it was an immediate product of the offense and defendant's apprehension.[47] However, the Court held that the second show-up was unnecessarily and impermissibly suggestive. "The

[42] *Richardson*, 673 A.2d at 147.
[43] 352 A.2d 765 (Del. 1976).
[44] *Id*. at 766.
[45] *Id*.
[46] *Id*.
[47] *Harris*, 350 A.2d at 770.

victims failed to identify the defendant 10 minutes [earlier] and it [was] undenied that police discussed the identification with the victims in the interim."[48]

Here, the show-up was not unnecessarily suggestive. Like *Watson*, the show-up was a natural development considering the facts and circumstances of this individual case. Sergeant Stevenson made the decision that a show-up would be the most effective method identification given the fact that the victims were together for a half-hour between the robbery and the show-up. The victims were instructed by Sergeant Stevenson to proceed one by one to the large window to make their identification.

This situation is distinguishable from *Smith* and *Harris*. Unlike those cases where the police discussed the identification with the victims, here, the victims were not interviewed by Sergeant Stevenson or any other police officer. This case is also distinguishable from Harris because the victims positively identified Harris the first time they saw him; the victims were not given another opportunity to identify the defendant that they failed to identify the first time. Also, the victims were not directly next to each other when they made their positive identification. Even though the victims were together in the barbershop when they made their identification, under the totality of the circumstances, there was not unfair police suggestion in this case thereby constituting an unnecessarily suggestive show-up.

[48] *Id*. at 771.

B. There Is No Danger of Irreparable Misidentification.

Assuming the show-up was unnecessarily suggestive, there is no danger of misidentification. First, the victims had ample opportunity to view the suspect. The suspect entered the barbershop, in the afternoon, on a clear day. All of the victims observed Harris enter the barbershop, and wait on the couch for a few moments before brandishing a black revolver at the victims.

Harris argues that the May 2011 statements of the six victims interviewed demonstrate that the victims had varying amounts of time and opportunity to view the suspect. These statements occurred three months after the robbery took place. If the victims were uncertain as to their pretrial identification, the lack of certainty goes to the weight of the evidence, not to its admissibility.[49]

Second, the victims' attention was most likely high because the suspect threatened the victims with the black revolver used in the robbery. Therefore, non-compliance with orders could have resulted in injury or death for the victims. Third, the officers who testified at the hearing indicated that there was not a prior description of the suspect given before the show-up. Therefore, this factor has no bearing the analysis. Fourth, the witnesses immediately and without hesitation affirmed that Harris was suspect. Lastly, the length of time between the second alleged robbery and the show-up was approximately 25-30 minutes. In

[49] *See Hubbard*, 782 A.2d 264, at *7.

Richardson, the total time period from the crime until the show up was an hour and fifteen minutes. Here, the time it took WPD to transport Harris to the scene of the crime was significantly less than in *Richardson*.

Therefore, considering the factors and the totality of the circumstances, there is no danger of irreparable misidentification.

B. Subsequent In-Court Identification.

Defense argues that any in-court identification will not be reliable and seeks suppression of the in-court identification.

The likelihood of misidentification is what violates a defendant's right to due process, causing the exclusion of evidence.[50] "[T]o satisfy due process, pretrial identifications resulting from a suggestive process must comport with the two-part analysis set forth by the United States Supreme Court in *Neil v. Biggers*."[51] First, Defendant must prove the identification was impermissible or unnecessarily suggestive.[52] If the Defendant meets his burden, the State must prove the unnecessarily suggestive identification would not lead to misidentification in court.[53] The likelihood of misidentification depends on the following factors:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of

[50] *Neil v. Biggers*, 409 U.S. 188, 198 (1972).
[51] *Byrd v. State*, 2011 WL 3524420, at *3 (Del.)
[52] *Id*.
[53] *Id*.

> certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.[54]

If this Court determines the out-of-court identification is inadmissible, then so is the in-court identification, unless it "did not result from the earlier confrontation . . . but was independent thereof.[55]

In *Hubbard*, the Court found nothing improper about the victim's pretrial identification and rejected defendant's argument that the unequivocal in-court identification was impermissibly tainted by the suggestive pretrial identification.[56] Also, in *Smith*, the Delaware Supreme Court held that although unnecessary suggestiveness tainted the out-of-court confrontation procedures, the in-court identifications were not unreliable as to warrant reversal.[57]

Here, there is no substantial likelihood of misidentification and as discussed above, the *Neil v. Biggers* factors have been satisfied. Thus, the victims may subsequently identify Harris in Court.

IV. Severance of Charges

Superior Court Criminal Rule 13 gives this Court discretion to "order two or more indictments . . . to be tried together if the offenses . . . could have been joined

[54] *Biggers*, 409 U.S. at 198.
[55] *Byrd*, 2011 WL 3524420, at *3.
[56] 782 A.2d 264 (Del. 2001).
[57] *Smith*, 352 A.2d 765 (Del. 1976).

in a single indictment . . . The procedure shall be the same as if the prosecution were under such single indictment." Superior Court Criminal Rule 8(a) states: "[t]wo or more offenses may be charged in the same indictment . . . in a separate count for each offense if the offense charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of common scheme or plan." Super. Ct. Crim. R. 8(a) has been interpreted as merely requiring, "that an act upon which the first offense is based be linked in some fashion to an act upon which the second offense is based."[58]

Defendant was indicted on March 28, 2011, on charges of Attempted Murder First Degree, 8 counts of Robbery First Degree, 7 counts of Possession of a Firearm During the Commission of a Felony, 8 counts of Kidnapping Second Degree, Unlawful Imprisonment First Degree and other related charges. There are a total of 50 counts in the indictment. Counts I-IX arise from the first alleged robbery that occurred on January 30, 2010. Counts X-L arise from the second alleged robbery that occurred on February 5, 2010. Defendant filed a motion to sever the charges arising from the first alleged robbery from the charges resulting from the second alleged robbery.

[58] *State v. Miles*, 2001 WL 1719350, at *1 (Del. Super. Dec. 4, 2001).

Pursuant to the relevant section of Super. Ct. Crim. R. 14, "[i]f it appears that a defendant . . . is prejudiced by a joinder of offenses . . . for trial together, the court may order an election or separate trials of counts . . . or provide whatever other relief justice requires . . ." This Court has the discretion to grant or deny severance.[59] Defendant bears the burden of demonstrating prejudice sufficient to require severance of charges. Allegations of hypothetical prejudice are insufficient.[60] A defendant suffers prejudice from joinder of offenses if:

> 1) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find; 2) the jury may use the evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt of the other crime or crimes; and 3) the defendant may be subject to embarrassment or confusion in presenting different and separate defenses to different charges.[61]

"As a general rule, the denial of a motion to sever results in an abuse of discretion when there is a reasonable probability that substantial prejudice may have resulted from a joint trial."[62] In deciding this motion, this Court must "weigh the competing interests of the State and the Defendant, as well as the Court's interest in promoting judicial economy and efficiency."[63] When evidence of one crime is admissible in the trial of the other crime, the defendant will not suffer any

[59] *Bates v. State*, 386 A.2d 1139, 1141 (Del. 1978).
[60] *Id*. at 1142.
[61] *Wiest v. State*, 542 A.2d 1193, 1195 (Del. 1988)(*citing State v. McKay*, 382 A.2d 260, 262 (Del. 1978)).
[62] *Weist*, 542 A.2d at 1195.
[63] *State v. Dehorty*, 2007 WL 625281, at *2 (Del. Super. Jan 30, 2007).

prejudice if the offenses are tried together.[64] "Generally, evidence of one crime is admissible in the trial of another crime when it has independent logical relevance and its probative value outweighs prejudice to the defendant."[65]

Defendant argues that the first alleged robbery should be severed from the second alleged robbery because the jury's impermissibly accumulation of the evidence is assumed in a joint trial. Specifically, Defendant alleges that: (1) Simmons' subsequent paralysis resulting from the shooting will be an emotionally compelling factor for the jury; (2) because both crime scenes are barbershops, that fact is likely to lead to accumulation of evidence rather than individual consideration of each charge; (3) danger that the jury will infer a general criminal disposition to Defendant, rather than on the evidence; (4) different defenses in each case will lead to jury confusion; (5) there is minimal judicial economy in this case.

The State opposes the motion because if granted, it would have to present virtually identical trials, with no benefit to Defendant. The State argues that Defendant's charges are related because of the ballistics evidence, the manner of conduct, the close proximity in time and location and Defendant's statement to the victims of the second incident that he committed the shooting in the second incident. The State submits that Defendant cannot demonstrate substantial

[64] *Garden v. State*, 815 A.2d 327, 334 (Del. 2003), superseded by statute on other grounds, 11 *Del. C.* § 4209(d)(2003)(citations omitted).
[65] *Id*. (internal quotations omitted)(*quoting Getz v. State*, 538 A.2d 726, 730 (Del. 1988).

prejudice because the evidence of each alleged robbery would be admitted into evidence under D.R.E. 404(b). Additionally, the State argues that if Defendant is prejudiced by the joinder of charges, severance can be denied under Delaware law.

Defendant's allegation of hypothetical prejudice that the jury may be confused by the evidence, or that the jury would impose a general criminal disposition against Defendant, does not show substantial injustice warranting severance of the charges. Defendant will not be overly prejudiced by a joinder of all offenses in the indictment. Ballistics expert testimony will establish that the bullet shot in the first alleged robbery, was fired from the same firearm used in the second alleged robbery.

Additionally, the WPD investigated both alleged robberies and Detective Burris was the Chief Investigating Officer for the incident on January 30, 2010, and February 5, 2011. Defendant was not arrested for the first robbery until he was caught fleeing from the second alleged robbery; evidence of the attempted flight is relevant to both robberies. The State submits that if separated, the same expert witness testimony will be used in each case, identical police witnesses and identical lay witnesses to establish the statements made by Defendant in the second robbery linking him to the first robbery. Because there is evidence in this case that will be admissible in both trials under D.R.E. 404(b) defendant will not benefit from separate trials.

Assuming *arguendo* that Defendant is prejudiced by the joinder, severance is nevertheless denied. Even if obvious prejudice existed in this case, where the charged offenses are of the same general crime and there is evidence of modus operandi, severance has been denied.[66]

In *Garden v. State*,[67] the Supreme Court of Delaware held that this Court did not abuse its discretion in denying defendant's motion to sever. This Court denied the motion to sever because both robberies, which were a day apart, were part of the same robbery scheme and evidence of the first robbery would be admissible in his trial for the second robbery/murder and vice versa, so no prejudice existed.[68] Defendant argued on appeal that the denial of the motion to sever affected his decision to testify in the second robbery/murder case. The Court held that defendant's claim does not support an abuse of discretion when weighted against the factors of joinder.[69] The short period of time between the two crimes and the similar *modus operandi*, "ma[de] it clear that the offenses involve the same course of conduct within a relatively brief span of time."[70] "The mere fact that the

[66] *State v. Hammons*, 2001 WL 1729117, at *3 (Del. Super. Dec. 5, 2001); *Younger v. State*, 496 A.2d 546, 550 (Del. 1985).
[67] 815 A.2d 327 (Del. 2003), superseded by statute on other grounds, 11 *Del. C.* § 4209(d) (2003) (citations omitted).
[68] *Id*. at 334.
[69] *Id*.
[70] *Id*.

crimes were separate and were committed against different individuals with a lapse of time between them, does not require severance."[71]

Here, like *Garden*, this case involves two alleged robberies that are substantially similar in nature. Both robberies occurred: (1) within 6 days of one another; (2) in the afternoon; (3) in barbershops; and (4) in East Wilmington. A firearm was used in each case and the State will present evidence at trial linking the bullet recovered from Simmons' body to the firearm used in the second alleged robbery. The events of these two robberies were part of a common plan. The difference is that the first alleged robbery resulted in paralysis for Simmons.

The first robbery charges are of independent logical relevance and would be admissible in a separate trial. Harris, by his statement to the victims of the second robbery, links himself to the first robbery by stating that he was the shooter from the first robbery.

Therefore, in observing the facts of this case, there is no discernable benefit to Harris from severing the charges resulting from the first robbery from those of the second robbery. Any issues at trial with cumulative evidence as a result of the 50 count indictment can be remedied with a curative jury instruction.

Conclusion

[71] *Id*. (internal citations committed)(*quoting Skinner v. State*, 575 A.2d 1108, 1118 (Del. 1990)).

Based on the forgoing, (1) Defendant's Motion to Suppress the photo array is **DENIED**; (2) Defendant's Motion to Suppress the show-up is **DENIED**; and (3) Defendant's Motion to Sever the Charges is **DENIED**.

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.